

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRIGIRISH AGRAWAL, ACCOUNTANT MEMBER

I.T.A No.550/Mum/2024 - A.Y. 2011-12
I.T.A No.551/Mum/2024 - A.Y. 2013-14

H. Sherul& Co Lukhi Empire, Opp Verani Tower, S.V. Road, Dahisar (E), Mumbai PAN: AACFH2878K	vs	ACIT-19(1), Mumbai, Piramal Chamber, Lalbaug, Mumbai, Pin-400012.
APPELLANT		RESPONDENT

Assessee by : Shri Vaidyalingan, CA
Respondent by : Shri P.D.Chougule (Addl. CIT) SRDR

Date of hearing : 29/08/2024
Date of pronouncement : 02/ 09/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Both the appeals of the assessee were filed against the order of the Learned National Faceless Appeal Centre (NFAC), Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Years 2011-12 & 2013-14, date of order 21.12.2023. The impugned orders are emanated from the orders of the Learned Assistant Commissioner of Income-tax, Circle 19(1), Mumbai, (in brevity the Id. AO) order passed under section 143(3)

read with section 147 of the Act, date of order 27/12/2018 for A.Y. 2011-12 and under section 143(3) of the Act, date of order 25/03/2016 for A.Y. 2013-14.

2. The assessee has taken the following grounds:-

ITA No.550/Mum/2024 - A.Y. 2011-12

“The learned Commissioner of Income-tax (Appeals) [“the Id. CIT(A)] erred in upholding the validity of reassessment though the original assessment was u/s. 143 (3) and there was no failure on the part of the appellant to disclose fully and truly all the material facts necessary for assessment.

The Id. CIT(A) erred in upholding the additions made by the Id. AO where the reopening of the assessment was on the basis of borrowed satisfaction and merely a change in opinion.

The Id. CIT(A) erred in affirming the order of the Id. AO which was based purely on suspicion, surmises and conjectures which is clear from para 5 of the reasons recorded in the reassessment order u/s 143(3) r.w.s. 147.

The Id. CIT(A) erred in passing the order u/s 250 of the Act without addressing the issues raised by the appellant of non-furnishing of copies of the statement or information relying on which the Id. AO has made the impugned addition. Furthermore, the CIT(A) erred in affirming the order of the Id. AO which was passed without affording the appellant an opportunity of cross examination of the parties on the basis of whose statements, the additions were made in the present case.

In the facts and in the circumstances of the present case, the Id. CIT(A) erred in affirming the addition of alleged bogus loan amounting to INR 1,85,50,000/- despite the fact that all documents to prove the genuineness of the loan and identity and creditworthiness of the lenders were filed during the course of assessment.

The appellant craves leave to add, amend, modify, alter and / or delete any of the above grounds of appeal.”

ITA 551/Mum/2024 – AY 2013-14

“1. On the facts and in the circumstances of the case, the learned AO erred in adding an amount of Rs 20,00,000/- being alleged non-genuine loan taken from M/s. Dharm Impex even though all documents to prove the genuineness of the loan and identity and creditworthiness of the lenders were filed during the course of assessment.

2. On the facts and in the circumstances of the case, the learned AO erred in disallowing an amount of Rs 21,42.678/ being interest on alleged non-genuine loan taken from M/s Dharm Impex and M/s, Mani Prabha Impex Private Limited even though all documents to prove the genuineness of the loan and identity and creditworthiness of the lenders were filed during the course of assessment.

3. On the facts and in the circumstances of the case, the learned AO erred in disallowing an amount of Rs.21,42.678/- being interest on alleged non-genuine loan taken from M/s Dharm Impex and M/s. Mani Prabha Impex Private Limited on the alleged ground that this expenditure is not incurred or laid out for Business of the appellant.”

3. The brief facts of the case are that for A.Y. 2011-12, first the assessment was completed under section 143(3) of the Act. After receiving the information from the Investigation Department, the assessee's case was reopened under section 147 and the impugned assessment was completed under section 143(3) / 147 of the Act. During the assessment it was found that the assessee has taken loan from M/s Mani Prabha Impex Pvt Ltd amount to Rs.1,85,50,000/-. On the basis of the report of the Investigation Department, the entire loan was treated as bogus and the nature of accommodation entry. So the said loan was added back with the total income of the assessee. For A.Y. 2013-14, the assessment was completed under section 143(3) with an addition of loan amount to Rs.20 lakhs received from M/s Dharm Impex and addition of interest paid to M/s Mani Prabha Impex Pvt Ltd amount to Rs.16,59,500/- and M/as Dharm Impex Rs.4,73,178/-.

Accordingly, the total amount works out to Rs.41,42,678/- which was added back as total income by treating the entire loan and interest as an accommodation entry. Being aggrieved, the assessee filed an appeal before the Id. CIT(A) for both the impugned assessment years. The Id.CIT(A) upheld the assessment orders. Being aggrieved on the appeal orders, the assessee filed the appeals before us.

ITA 550/Mum/2024 – A.Y. 2011-12

4. We heard the rival submission and considered the documents available in the record. The Id. AR argued and filed the written submission which is kept on record (in short APB). The Id.AR challenged the legal grounds related to jurisdiction for reopening of the case under section 147 by issuing notice under section 148 of the Act. The Id.AR placed that in impugned assessment year, the assessment was first completed under section 143(3) of the Act dated of order 06/03/2014. The assessee, in pursuance to the notice under section 142(1) dated 02/09/2013 submitted the entire details of unsecured loan as required in the said notice. Copy of the notice annexed in **APB pages 1 to 3**. However, the Id.AR drew our attention in the assessment order under section 143(3) dated 06/03/2014 where the Assessing Officer mentioned that the representative of the assessee attended from time to time and submitted all the relevant documents. During the assessment, no addition was made on account of unexplained loan. During the assessment and in appeal, the Id.AR submitted confirmation, bank statement of the loaner and loanee confirmation and all the relevant details are filed which are annexed in APB pages 6 to 28. The assessee has completed its onus by submitting the documents required by the Id. AO.

5. The Id.DR argued and fully relied on the order of the revenue authorities.

6. The Id.AR further argued and relied on the order of the Hon'ble **High Court of Bombay** in the following cases: -

1. Seimens Financial Services P. Ltd vs. DCIT, WP No.4888 of 2022 date of order

25/08/2023. The relevant paragraphs is reproduced as below: -

35. *During the course of assessment proceedings, notice had been issued to petitioner. In reply to the notice under Section 143(2), petitioner had by its letter dated 6 December 2018 recorded, " discussion during the course of the hearing based upon our The transaction wise summary of the software consumable was made available. This was considered during the assessment proceedings and the assessment order accepting revised return came to be passed.*

36 *We would agree with the submissions of Mr. Pardiwalla that if change of opinion concept is given a go by, that would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. It would in effect be giving power to review which he does not possess. The Assessing Officer has only power to reassess not to review. If the concept of change of opinion is removed as contended on behalf of the Revenue, then in the garb of reopening the assessment, review would take place. The concept of change opinion is an in-built test to check abuse of power by the Assessing Officer.*

As held in Mathew Cherian (Supra), whether under old or new regime of reassessment, it is settled position that the issues decided categorically should not be revisited in the guise of reassessment. That would include issues where query have been raised during the assessment and query have been answered and accepted by the Assessing Officer while passing the assessment order. As held in Aroni Commercials (supra) even if assessment order has not specifically dealt with that issue, once the query is raised it is deemed to have been considered and the explanation accepted by the Assessing officer. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised."

Aditi Constructions vs DCIT W.P. No.783 of 2016, dt of order 04/05/2023.

The relevant paragraphs is reproduced as below: -

“CONCLUSION

8. *We have heard both learned counsel and carefully perused the papers and proceedings.*

9. *We find that the jurisdictional conditions for invoking section 147-148 are not satisfied as there is no failure to disclose material facts fully and truly. It is not in dispute that by the letter dated 11 September 2015 (Exhibit H) the Petitioner have submitted all the particulars along with supporting documents to the Respondent No.1. Hence the reasons to believe and s presumption based on the statement of Shri Bhanwarlal Jain (a third party) in the course of a search, that the loans of the entities were bogus, or accommodation entries was clearly dispelled. Moreover, the specific provisions of 8. 1530 would prevail over the general provisions of section 147 in the case of search on 3 party.*

10. *In our view, once the Petitioner provided the bank statements and details of parties as sought for, the AO must necessarily carefully examine the material and then give particulars and reason/s to believe otherwise, whilst rejecting the objections, more so, when there is an assessment order u/s 143(3). This process would be in tune with the principles of 'shifting of onus' under the evidence act. The Supreme Court in Lakhmani Mewal Das has held that:*

"The expression 'reason to believe' does not mean purely subjective satisfaction on the part of the Income tax officer. The reason must be held in good faith. It cannot be merely a pretence.

It is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section."

"It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income-tax Officer,"

11. *We find that the 'reasons recorded', do not state the primary fact/s that had not been disclosed as laid down in the case of Gemini Leathers v ITO". It is further*

evident that the case of Rushabh Enterprises (same group as the Petitioner) in W.P No. 167/2015 (decided on 15th April 2015) where the reopening was quashed on the basis that there is no tangible material for reopening was also not considered.

12. The criteria for reopening of assessment after a period of four years are no longer *res integra* in view of the judgement of this Court in the case of Ananta Landmark P. Ltd v Dy. CIT wherein this Court held that where assessment was not sought to be reopened on the reasonable belief that income had escaped the

assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of Income but was a case wherein assessment was sought to be reopened on account of change of opinion of AO the reopening was not justified. It is also held that where primary facts necessary for assessment are fully and truly disclosed the AD is not entitled to reopen the assessment on a change of opinion. It is held that while considering the material on record, one view is conclusively taken by AO, it would not be open for the AD to reopen the assessment based on the very same material and take another view.

13. In the present case, a perusal of the reasons recorded by Respondent No. 1, indicate that, the Respondent No. 1 has relied upon facts and figures on the record; and the queries were answered and particulars were provided vide letter dated 11th September 2015 is also not disputed. This Court in the case of Nikunj Eximp Enterprises (P) Ltd. (*supra*) has considered the above aspect whilst holding that:

"...This satisfaction has necessarily to be the subjective satisfaction of the Assessing Officer and unless it is shown by the Petitioner that such a reasonable belief as arrived at by the Assessing Officer in the facts of the cases is just not possible, the proceedings for reassessment duly initiated will not be stalled."

In our view, the Petitioner has by production of bank statements and supporting documents shown that the reasonable belief of the AO was unfounded and consequently the presumption that the Petitioner was one of the beneficiary of the accommodation entries based on the statement of the third party was disproved. Consequently, the onus would be on the AO to provide reasons to disbelieve the bank statements and supporting documents for

reopening the assessment. That in our view has not been spelled out and therefore, the reassessment sought to be Initiated deserves to be stalled.

16. We, therefore pass the following order-

I. The impugned notice u/s 148 of the Act dated 9 March 2015, and the order dated 21 January 2016, by Respondent No. 1 for AY 2008-09 are quashed and set aside.

ii. Rule made absolute in above terms. No costs.”

7. The Ld.AR respectfully relied on the decision of the co-ordinate bench in the case of **Allied Engineers & Elastomers vs ITO-18(1)(1)** in ITA No.1687/Mum/2024, date of pronouncement 01/08/2024. The relevant paragraph is reproduced as below:-

“6.

We notice that during cross examination by the assessee’s partner Mr. Vinod Bhatia, Mr. Harish K Chandak has categorically denied having given hawala bills to the assessee (page 87 to 89 of paper book). From the perusal of the entire facts in assessee’s case as explained herein above, it is clear that the AO has completed the reassessment without proper appreciation of the facts and evidence submitted by the assessee in support of the alleged bogus purchases and merely based on the information from DDIT(Inv). Therefore, in our considered view the entire reopening is carried out only on the basis of report of investigation wing without any independent enquiry and without any tangible material in the hands of the AO to show that the assessee was involved in taking accommodation entry towards bogus purchases. Considering the facts unique to the facts and circumstances of the present case we hold that the AO could not have reopened the assessment only on suspicion which makes the re-opening invalid in the eyes of law. Accordingly, the addition made by the AO is not sustainable and liable to be added.

7. *Ground No.2 and 3 raised without prejudice grounds and since we have already deleted the addition these grounds have become academic. Ground no.4 is consequential and does not warrant any adjudication.*

8. *In the result, the appeal of the assessee is allowed."*

8. Considering the above submission, we find that the Ld.AO has already adjudicated the issue by issuing notice under section 142(1) during the impugned assessment year by the order passed U/s 143(3) of the Act. The same issue was reopened by the report of the Investigation department. During the assessment, we find that the Ld.AO had not made any separate investigation against the unsecured loan which was treated as accommodation entry. Mere change of opinion cannot be the reason for reopening. We respectfully relied on the order of **Seimens Financial Services P. Ltd** (supra) and **Aditi Constructions vs DCIT** (supra) and **Engineers & Allied Elastomers** (supra) which have the common legal issue. Accordingly, the notice issued under section 148 is bad in law. The Ld. AO acted beyond jurisdiction to reopen the assessment. We set aside the impugned appeal order and direct the Ld. AO to delete the addition amount to Rs.1,85,50,000/-.

9. In the result, the appeal of the assessee bearing **ITA No.550/Mum/2024** is allowed.

ITA No.551/Mum/2024 : AY 2013-14

10. We heard the rival submission and considered the documents available in the record. The Ld.AR argued and placed that the entire documents was duly placed before the Ld.AO and before the Ld.CIT(A). The Ld.AO, in its assessment order, already accepted the submission of the assessee related to the documents and confirmation of the loan-creditors, M/s Dharma Impex & M/s Maniprabha Impex Pvt Ltd. Further, the interest was paid to M/s Maniprabha Impex Pvt

Ltd.&M/s Dharma Impex through banking channel and the TDS was deducted on interest.

11. The Id.AR submitted the list of documents which were submitted before the revenue authorities and were placed before the bench also. The documents are as below:-

“Confirmation from the lender, Dharam Impex (Page -2)

Appellant's bank statements for loan taken from and repaid to Dharam Impex (Pages 9, 15, 16, 17, 18)

Affidavit of the lender, Maniprabha Impex Private Limited confirming the loan and interest thereon (Page 11)

Bank statements of Maniprabha Impex Private Limited for interest payment and Dharam Impex reflecting the loan given to the Appellant and receipt of interest from the Appellant (Pages 5 and 6)

ITR-V of the lenders, Dharam Impex and Maniprabha Impex Private Limited (Pages 8 and 14)”

12. The Ld.AR further drew our attention in appeal order para 6 which is reproduced as below: -

“6.0 I have perused the order, grounds of appeal and the submissions of the assessee. The grounds of appeal are similar to the grounds for AY 2011- 12 wherein the AD, treated the loan of Rs 1.85.50.000- availed by the assessee from Mi's Manprabha impex as accommodation entry since the entity was managed and controlled by Shawn and group. In the appellate order for AY 2011-12, have upheld then of the AO in treating the loan as accommodation entry, Siro e facts of the case are similar, following the aforesaid earlier appellate order, the addition of bogus loan Rs. 20.00,000/- from Mis Dharam Impex and interest of Rs. 4.73.178- and Rs. 16,69,500/- paid to Mis Dharma Impex & Mis. Manipratha Impex respectively is hereby upheld. The grounds of appeal 1,2 & 3 are dismissed.

Ground No.4 raised by the appellant is regarding the penalty proceedings which are a separate proceeding and the same will be adjudicated separately. Hence, the ground no 4 is dismissed.

In the result, the appeal is dismissed.”

13. the Ld.DR argued and fully relied on the order of the revenue authorities.

14 Considering the above submission, we find that the entire addition was made on the basis of the report of the investigation department. The Ld.AO has not made any separate verification about the loan creditors and the interest payment. The assessee has shifted its onus to the revenue by submitting all relevant documents in relation to the loan-creditors. In case of interest, the assessee deducted TDS and paid the amount through banking channel. The Ld.AO was not able to bring any contrary fact and not even nullified the documents submitted by the assessee. The Id. AO & Id. CIT(A) only relied on the report of the investigating authority. The Id.CIT(A) only followed the order of the Ld.AO and confirmed the addition. We find that the entire addition was made without proper verification. The assessee had shifted its onus by submitting the evidence before the revenue authority. No further investigation was done. The Id. AO was unjustified for addition the same. In our considered view, the impugned appeal order is set aside. The addition amount to Rs.41,42,678/- is deleted.

15. In the result, appeal of the assessee **ITA No.551/Mum/2024** is allowed.

16. In the result, appeals bearing **ITA Nos 550 & 551/Mum/2024** are allowed.

Order pronounced in the open court on 02nd day of September 2024.

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 02/09/2024

Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

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BY ORDER,

(Asstt. Registrar), **ITAT, Mumbai**